

Memorandum

To: Governor's Energy Task Force Structure Committee

From: PSC staff

Date: September 30, 2003

Re: PSC authority over utility transactions

Background

Currently, the PSC asserts under its general supervisory powers the implicit authority to review significant transactions involving regulated public utility property. In contrast, public utility commissions in 45 states have explicit statutory authority to review utility sales and transfers. State commissions in our region (North Dakota, South Dakota, Wyoming, Idaho, Colorado, Utah, Oregon and Washington) are among the majority of states with explicit statutory authority to approve utility sales and transfers. Copies of the relevant statutes from those states are attached to this memo.

In most cases where the Montana PSC asserts its authority to review a sale or transfer of assets, the utility concerned challenges the assertion as being without clear statutory authority. Clarification of the PSC's authority over these transactions is advisable to avoid future disputes and litigation regarding PSC authority. PSC review under clear statutory authority will streamline the process.

The current arrangement produces substantial uncertainty about authority to review and produces weaker results for all concerned. In one case, Pacificorp's sale to Flathead Electric Co-op, the PSC had to obtain a court order slowing the sale for 30 days while conducting a cursory review. In particular, the PSC was unable to conduct any meaningful review of the sale price. Subsequently, a former PacifiCorp manager confirmed to the Flathead Co-op board what many believed – the sales price was many millions too high. A transaction that was, as a general matter, clearly in the public interest saddled the purchaser and its members with substantial excess debt with which they are still struggling.

Also, current law specifically prevented the PSC from conducting any review of the MPC generation sale to PPL. At the time, many argued that a sale of all generation to one purchaser would create substantial local market power in supply. The PSC was powerless even to evaluate that question.

PSC review of utility transactions produces substantial benefits both to the purchaser and to the customers, ensuring an acceptable purchaser and a transaction that does not harm the utility, the

customers, or the public interest. Good review should not be prolonged, but must be long enough to examine the financial underpinnings on which a transaction will succeed or fail.

Key elements of statutory authority

The key elements of laws in surrounding states concerning state commission authority over utility sales, as well as in Senate Bill 234 (which was supported by the PSC but was tabled in committee in the 2003 legislative session), include:

- A requirement for prior PSC approval of a public utility sale, transfer, merger, etc.
- Exceptions from the PSC approval requirement for:
 - Sales of utility property that is not necessary or useful in the performance of the utility's duties to the public.
 - Sales of property valued below a minimum dollar amount set by law (e.g., \$500,000 in North Dakota).

Attachments (relevant laws from surrounding states; SB 234)

2003 Montana Legislature

About Bill -- Links

SENATE BILL NO. 234

INTRODUCED BY J. COBB

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE PUBLIC SERVICE COMMISSION'S AUTHORITY TO APPROVE, DISAPPROVE, MODIFY, OR CONDITION THE ACQUISITION OR TRANSFER OF A PUBLIC UTILITY OR A PUBLIC UTILITY'S PROPERTY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Commission approval of public utility acquisition or transfer. (1) A public utility may not be acquired or transferred without the prior approval of the commission.

(2) The commission may approve, disapprove, modify, or condition an acquisition or transfer of a public utility to ensure that:

- (a) the public interest will not be adversely affected;
- (b) the proposed acquisition or transfer will not diminish the public utility's ability to provide reasonably adequate and reliable public utility services at just and reasonable rates;
- (c) the cost of and rates for supplying service will not be increased by reason of the acquisition or transfer; and
- (d) the applicant for acquisition or transfer has a bona fide intent and financial ability to operate and maintain the public utility.

(3) (a) For purposes of this section, "acquisition or transfer" means any transaction that, regardless of the means by which it is accomplished, results in:

- (i) a change in ownership or control of a majority of the voting capital stock of a public utility or the ownership or control of any entity that owns or controls a majority of the voting capital stock of a public utility; or
 - (ii) the selling, assigning, leasing, or transferring of public utility property used in providing utility service.
- (b) Acquisition or transfer does not include the selling, assigning, leasing, or transferring of public utility property in the ordinary course of business that the commission determines is not necessary or useful in providing utility service to the public.

NEW SECTION. Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 69, chapter 3, part 1, and the provisions of Title 69, chapter 3, part 1, apply to [section 1].

Source: [Legal > States Legal - U.S. > South Dakota > Statutes & Regulations > SD - South Dakota Codified Laws - South Dakota ⓘ](#)
TOC: [South Dakota Codified Laws - South Dakota > /.../ > CHAPTER 49-34A. GAS AND ELECTRIC UTILITIES REGULATION > § 49-34A-35. Sale, lease, or merger between public utilities prohibited unless authorized by commission -- Small transactions excepted](#)
Terms: [utility sale transfer](#) ([Edit Search](#))

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S.D. Codified Laws § 49-34A-35

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*** STATUTES CURRENT THROUGH 2003 ADVANCE CODE SERVICE PAMPHLET NUMBER 2.

*** ANNOTATIONS CURRENT THROUGH 2002 SD 162 ***

TITLE 49. PUBLIC **UTILITIES** AND CARRIERS
CHAPTER 49-34A. GAS AND ELECTRIC **UTILITIES** REGULATION

✦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

S.D. Codified Laws § 49-34A-35 (2002)

§ 49-34A-35. **Sale**, lease, or merger between public **utilities** prohibited unless authorized by commission -- Small transactions excepted

No public **utility** shall sell, lease or otherwise dispose of its property or business constituting an operating unit or system in this state to another public **utility** or purchase the property or business constituting an operating unit or system in this state to another public **utility** or merge or consolidate with another public **utility** operating in this state, without first being authorized to do so by the Public **Utilities** Commission; provided, that in the event such **sale**, lease or other disposition of the property or business of one public **utility** to another public **utility** does not involve a **sale**, lease or disposition wherein the actual consideration exceeds two hundred thousand dollars, such **sale**, lease or disposition shall not be subject to the provisions of this section.

HISTORY: Source: SL 1975, ch 283, § 23.

USER NOTE: For more generally applicable notes, see notes under the first section of this part, chapter or title.

Source: [Legal > States Legal - U.S. > South Dakota > Statutes & Regulations > SD - South Dakota Codified Laws - South Dakota ⓘ](#)
TOC: [South Dakota Codified Laws - South Dakota > /.../ > CHAPTER 49-34A. GAS AND ELECTRIC UTILITIES REGULATION > § 49-34A-35. Sale, lease, or merger between public utilities prohibited unless authorized by commission -- Small transactions excepted](#)
Terms: [utility sale transfer](#) ([Edit Search](#))
View: Full
Date/Time: Thursday, January 30, 2003 - 7:04 PM EST

Source: [Legal](#) > [States Legal - U.S.](#) > [North Dakota](#) > [Statutes & Regulations](#) > [ND - North Dakota Century Code](#) ①

TOC: [North Dakota Century Code](#) > [/.../](#) > [CHAPTER 49-04. DUTIES OF PUBLIC UTILITIES](#) > § 49-04-05. Commission approval required to dispose of or encumber franchises, works, or systems -- Exceptions

Terms: [sale of assets utility](#) ([Edit Search](#))

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N.D. Cent. Code, § 49-04-05

NORTH DAKOTA CENTURY CODE

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*** STATUTES CURRENT THROUGH THE 2001 GENERAL AND SPECIAL SESSIONS. ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 30, 2002. ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 49-04. DUTIES OF PUBLIC UTILITIES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

N.D. Cent. Code, § 49-04-05 (2002)

§ 49-04-05. Commission approval required to dispose of or encumber franchises, works, or systems -- Exceptions

A public **utility** may not dispose of, encumber, merge, or consolidate its franchise, works, or system necessary or useful in the performance of its duties to the public without prior commission approval. This section does not apply to:

1. Disposal or encumbrance of tangible property valued at less than five hundred thousand dollars.
2. **Sale** of securities registered with the federal securities and exchange commission.

HISTORY: SOURCE: S.L. 1919, ch. 192, § 21; 1925 Supp., § 4609c21; R.C. 1943, § 49-0405; S.L. 1977, ch. 441, § 1; 1989, ch. 567, § 1.

WHO MAY APPLY.

A person who enters into a contract to sell a **utility**, which must be approved by the commission in order to become effective, vests in the proposed purchaser a sufficient interest to entitle him to make application for approval of the proposed **sale**. Otter Tail Power Co. v. Clark, 59 N.D. 320, 229 N.W. 915 (1930).

The primary duty to make application to the commission for authority to sell or otherwise dispose of a public **utility** property rests upon the seller. Otter Tail Power Co. v. Clark, 59 N.D. 320, 229 N.W. 915 (1930).

COLLATERAL REFERENCES.

Public Service Commissions 6.11.

73B C.J.S. Public **Utilities**, § 72.

37-1-104. Reorganization of public utility; definition; approval.

(a) No reorganization of a public utility shall take place without prior approval by the public service commission. The commission shall not approve any proposed reorganization if the commission finds, after public notice and opportunity for public hearing, that the reorganization will adversely affect the utility's ability to serve the public.

(b) For purposes of this section, "reorganization" means any transaction which, regardless of the means by which it is accomplished, results in a change in the ownership of a majority of the voting capital stock of a public utility, or the ownership or control of any entity which owns or controls a majority of the voting capital stock of a public utility. "Reorganization" as used in this section shall not include a mortgage or pledge transaction entered into to secure a bona fide borrowing by the party granting the mortgage or making the pledge.

37-1-105. Application for reorganization; fees; reimbursement of costs and expenses to state; expenses not to be included in rates.

(a) Every applicant for approval of a reorganization by the public service commission under this act [§§ 37-1-104 through 37-1-106] shall pay a filing fee of one hundred dollars (\$100.00) for each application and ten dollars (\$10.00) plus ten cents (\$.10) per page for every amendment to any application. These fees shall be deposited in the general fund. In addition the applicant shall reimburse the state for the expenses of the state in reviewing and acting upon each application and defending any public service commission decision in case of legal appeal. The expenses of the state shall not be deemed to include the normal salary and benefits of the public service commissioners but shall include substantially all other actual expenses of the state in connection with the application. The public service commission may require the applicant to post a bond or make a prepayment to assure the required reimbursement. No charge for expenses in connection with any application under this act may be included in the rates charged to Wyoming customers. The reimbursements collected pursuant to this section shall be deposited in a trust and agency account and may be expended by the public service commission following appropriations by the legislature.

(b) No charge for any expenses of any reorganization shall be included in the rate base of any Wyoming public utility.

37-1-106. Rulemaking authority.

The public service commission shall adopt rules and regulations to implement the provisions of W.S. 37-1-104 and 37-1-105.



Idaho Statutes

TITLE 61 PUBLIC UTILITY REGULATION CHAPTER 3

DUTIES OF PUBLIC UTILITIES

61-328. ELECTRIC UTILITIES -- SALE OF PROPERTY TO BE APPROVED BY COMMISSION. (1) No electric public utility or electrical corporation as defined in chapter 1, title 61, Idaho Code, owning, controlling or operating any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall merge, sell, lease, assign or transfer, directly or indirectly, in any manner whatsoever, any such property or interest therein, or the operation, management or control thereof, or any certificate of convenience and necessity or franchise covering the same, except when authorized to do so by order of the public utilities commission.

(2) The electric public utility or electrical corporation shall file a verified application setting forth such facts as the commission shall prescribe or require. The commission shall issue a public notice and shall conduct a public hearing upon the application.

(3) Before authorizing the transaction, the public utilities commission shall find

- (a) That the transaction is consistent with the public interest;
- (b) That the cost of and rates for supplying service will not be increased by reason of such transaction; and
- (c) That the applicant for such acquisition or transfer has the bona fide intent and financial ability to operate and maintain said property in the public service.

The applicant shall bear the burden of showing that standards listed above have been satisfied.

(4) The commission shall have power to issue said authorization and order as prayed for, or to refuse to issue the same, or to issue such authorization and order with respect only to a part of the property involved. The commission shall include in any authorization or order the conditions required by the director of the department of water resources under section 42-1701(6), Idaho Code. The commission may attach to its authorization and order such other terms and conditions as in its judgment the public convenience and necessity may require.

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Chapter 80.12 RCW
TRANSFERS OF PROPERTY

SECTIONS

80.12.010 Definition.

80.12.020 Order required to sell, merge, etc.

80.12.030 Disposal without authorization void.

80.12.040 Authority required to acquire property or securities of utility.

80.12.045 Small local exchange company -- Chapter does not apply.

80.12.050 Rules and regulations.

80.12.060 Penalty.

RCW 80.12.010

Definition.

The term "public service company," as used in this chapter, shall mean every company now or hereafter engaged in business in this state as a public utility and subject to regulation as to rates and service by the utilities and transportation commission under the provisions of this title.

[1961 c 14 § 80.12.010. Prior: 1953 c 95 § 6; 1941 c 159 § 1, part; Rem. Supp. 1941 § 10440a.]

RCW 80.12.020

Order required to sell, merge, etc.

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do: PROVIDED, That this section shall not apply to any sale, lease, assignment or other disposal of such franchises, properties or facilities to a special purpose district as defined in RCW 36.96.010, city, county, or town.

[1981 c 117 § 1; 1961 c 14 § 80.12.020. Prior: 1945 c 75 § 1; 1941 c 159 § 2; Rem. Supp. 1945 § 10440b.]

RCW 80.12.030

Disposal without authorization void.

Any such sale, lease, assignment, or other disposition, merger or consolidation made without authority of the commission shall be void.

[1961 c 14 § 80.12.030. Prior: 1941 c 159 § 3; Rem. Supp. 1941 § 10440c.]

RCW 80.12.040

Authority required to acquire property or securities of utility.

No public service company shall, directly or indirectly, purchase, acquire, or become the owner of any

TRANSACTIONS INVOLVING UTILITIES

757.480 Approval needed prior to disposal, mortgage or encumbrance of certain operative utility property or consolidation with another public utility; exceptions. (1) A public utility doing business in Oregon shall not, without first obtaining the Public Utility Commission's approval of such transaction:

- (a) Except as provided in subsection (5) of this section, sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$100,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility;
 - (b) Mortgage or otherwise encumber the whole or any part of the property of such public utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such public utility or public utility property, or perform any service as a public utility; or
 - (c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any public utility property, or perform any service as a public utility, or any part thereof, with any other public utility.
- (2) A public utility that sells, leases, assigns or otherwise disposes of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$25,000, but less than \$100,000, shall notify the commission of the sale within 60 days following the date of the sale.
- (3) Every sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation subject to subsection (1) of this section made other than in accordance with the order of the commission authorizing the same is void.
- (4) This section does not prohibit or invalidate the sale, lease or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public.
- (5) A water utility doing business in Oregon shall not, without first obtaining the Public Utility Commission's approval of such transaction, sell, lease, assign or otherwise dispose of the whole of the property of such water utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$10,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such water utility or water utility property, or perform any service as a water utility. [Formerly 757.155; 1999 c.530 §1]

757.485 Purchase of property or stocks of one utility by another. (1) No public utility shall, directly or indirectly, purchase, acquire or become the owner of any of the stocks or bonds or property utilized for utility purposes and having a value in excess of \$10,000 of any other public utility unless authorized so to do by the Public Utility Commission.

- (2) Every contract by any public utility for the purchase, acquisition, assignment or transfer to it of any of the stock of any other public utility by or through any person, partnership or corporation without the approval of the commission shall be void and of no effect, and no such transfer or assignment of such stock upon the books of the corporation pursuant to any such contract is effective for any purpose.

54-4-28. Merger, consolidation, or combination.

No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, without the consent and approval of the Public Service Commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.

Amended by Chapter 9, 2001 General Session

COLORADO**Document 1 of 1****Source:**

Colorado Statutes/TITLE 40 UTILITIES/PUBLIC UTILITIES/General and Administrative/ARTICLE 5 NEW CONSTRUCTION - EXTENSION/40-5-105. Certificate or assets may be sold, assigned, or leased.

40-5-105. Certificate or assets may be sold, assigned, or leased.

The assets of any public utility, including any certificate of public convenience and necessity or rights obtained under any such certificate held, owned, or obtained by any public utility, may be sold, assigned, or leased as any other property other than in the normal course of business but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe.

Source: L. 45: p. 526, § 2. CSA: C. 137, § 36. CRS 53: § 115-5-5. C.R.S. 1963: § 115-5-5. L. 69: p. 938, § 31. L. 71: p. 1100, § 1.

Am. Jur.2d. See 64 Am. Jur.2d, Public Utilities, § § 84, 306.

C.J.S. See 73B C.J.S., Public Utilities, § § 69, 70.

Law reviews. For article, "Generation and Transmission Loan Policy Under the Rural Electrification Act", see 43 Den. L.J. 269 (1966). For article, "Utility Use of Renewable Resources: Legal and Economic Implications", see 59 Den. L.J. 663 (1982).

Jurisdiction over transfer of assets. The commission has jurisdiction to review telephone company's transfer of directory publishing assets to related corporation. *Mountain States Telephone & Telegraph v. P.U.C.*, 763 P.2d 1020 (Colo. 1988).

Action pursuant to this provision and article XXV of the state constitution requiring commission approval of transfer of utility's assets not made in the ordinary course of business does not constitute an unconstitutional taking. *Mountain States Telephone & Telegraph v. P.U.C.*, 763 P.2d 1020 (Colo. 1988).

The public utilities commission's role in deleting affected territories is a ministerial function. It merely accepts the surrender of certificate rights and deletes the territories from the certificates; it has no discretion to determine whether deleted portions are in the public interest. *City of Colorado Springs v. Mountain View Elec. Ass'n*, 925 P.2d 1378 (Colo. App. 1995).

Commission may not order sale or fix sale price. If negotiated sales of facilities are made at unreasonable prices, the public utilities commission may well choose to refuse its approval of the sale, but it may not order a sale or fix the sale price before the negotiations have even begun. *Public Util. Comm'n v. Home Light & Power Co.*, 163 Colo. 72, 428 P.2d 928 (1967).

Change in record ownership not sufficient basis to order service discontinuance. The change of ownership may also entail a change in the nature of the service rendered, but change in the record ownership, without more, is not a sufficient basis on which to order discontinuance of service. *Public Util. Comm'n v. Home Light & Power Co.*, 163 Colo. 72, 428 P.2d 928 (1967).

Special expertise of commission in regulating utilities is given great deference in its selection of an appropriate remedy for telephone company's transfer of directory publishing assets. *Mountain States Telephone & Telegraph v. P.U.C.*, 763 P.2d 1020 (Colo. 1988).

Remedy of undoing transfer made without prior approval of PUC was appropriate. *Mountain States Telephone & Telegraph v. P.U.C.*, 763 P.2d 1020 (Colo. 1988).

Articles 3 and 4 of this title provide sufficient general standards for guidance relative to application of